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GOVERNMENT  
ACCOUNTABILITY BOARD

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April 21, 2011

**VIA MESSENGER**

Mr. Kevin Kennedy  
Wisconsin Government Accountability Board  
212 East Washington Avenue, Third Floor  
Post Office Box 7984  
Madison, WI 53707-7984

Re: In Re Petition to Recall Senator Dan Kapanke of the 32<sup>nd</sup> Senate District  
WGAB ID # 0600016

Dear Mr. Kennedy:

Enclosed please find Senator Kapanke's Reply in Support of his Written Challenge to the Recall Petition Offered for Filing on April 1, 2011. By copy of this letter, we are providing a copy of same to Attorney Levinson by facsimile and mail this date.

Sincerely,

**MICHAEL BEST & FRIEDRICH LLP**



Eric M. McLeod

EMM:skt

Enclosure

cc: Jeremy Levinson, Esq. (*via fax & mail*)

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STATE OF WISCONSIN  
BEFORE THE GOVERNMENT ACCOUNTABILITY BOARD

11 APR 21 PM 4:18

IN RE PETITION TO  
RECALL SENATOR DAN KAPANKE  
OF THE 32<sup>nd</sup> SENATE DISTRICT

GOVERNMENT  
ACCOUNTABILITY BOARD WGAB ID # 0600016

**SENATOR KAPANKE'S REPLY IN SUPPORT OF HIS WRITTEN CHALLENGE  
TO THE RECALL PETITION OFFERED FOR FILING ON APRIL 1, 2011**

**INTRODUCTION**

The purported<sup>1</sup> rebuttal offered by the Committee to Recall Kapanke (the "Recall Committee") fails to address the fundamental defect in Patrick Scheller's effort to present a valid recall petition. By failing to register as required by Wis. Stat. § 9.10(2)(d), Mr. Scheller never fulfilled the prerequisites to circulating a recall petition. The relevant statutory provisions clearly state that only an individual can be "the petitioner" for purposes of circulating and offering for filing a recall petition. While the Recall Committee can support (or oppose) Mr. Scheller's efforts, the Recall Committee is not the petitioner and the mere fact that the Recall Committee registered does not satisfy Mr. Scheller's obligation to do so.

**ARGUMENT**

**I. Wisconsin Law Clearly Requires That A Recall Petitioner Be An Individual**

Despite the Recall Committee's hyperbolic rhetoric, it is neither "absurdly rigid" nor resorting to a "gimmick"<sup>2</sup> to state what the statutes clearly require – that "the petitioner" must be

<sup>1</sup> Wis. Stat. § 9.10(3)(b) states that "the petitioner may file a written rebuttal to the challenge with [the Government Accountability Board] within 5 days after the challenge is filed." It does not provide a mechanism for other interested persons to file rebuttals with GAB. Counsel for the Recall Committee do not indicate that they filed the rebuttal in this matter on Mr. Scheller's behalf and the signature block indicates that Friebert, Finerty & St. John, S.C. is appearing in this matter as attorneys only for the Recall Committee. Consequently, the petitioner in this matter, Mr. Scheller, has not provided a rebuttal to Senator Kapanke's challenge and the Government Accountability Board should disregard the rebuttal filed by the Recall Committee.

<sup>2</sup> Recall Committee's Rebuttal at 5 n. 3.

an individual. The statutory scheme governing the recall of elective officials is replete with references to individuals. For example, only qualified electors are permitted to collectively petition for the recall of a State Senator (Wis. Stat. § 9.10(1)) and each individual page of the Recall Petition must be certified by an adult who either is a qualified elector or would be a qualified elector but for the fact that they reside outside the 32<sup>nd</sup> Senate District (Wis. Stat. §§ 5.02(16g), 9.10(2)(em)2.). Most significantly, each recall effort must be initiated by an individual who indicates “his or her intent to circulate a recall petition” and who ultimately offers the recall petition for filing. Wis. Stat. § 9.10(2)(d).

The statutory requirement that “the petitioner” must indicate “his or her intent” in order to trigger the sixty-day circulation period unambiguously establishes that only an *individual* can serve as “the petitioner.” The Recall Committee’s erroneous contention that *it* is the petitioner rests on an interpretation of Wis. Stat. § 9.10(2)(d) that completely ignores the legislature’s use of the phrase “his or her.”<sup>3</sup> Fundamental rules of statutory construction do not allow either the Recall Committee or the Government Accountability Board to delete this phrase from the statute. *Johnson v. State*, 76 Wis. 2d 672, 676, 251 N.W.2d 834 (1977) (“a law should be so construed that no word or clause shall be rendered surplusage . . . every word appearing in a statute should contribute to the construction of the statute in accordance with its ordinary and customary meaning”) (internal quotes and citations omitted); *see also Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980) (“a statute should be construed so that no word or clause shall be rendered surplusage and every word if possible should be given effect”).

The legislature’s unambiguous requirement that “the petitioner” must be an individual who is capable of expressing “his or her intent” also cannot be isolated and confined to a single

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<sup>3</sup> In statutory interpretation, the words “his” and “her” are to be “construed according to common and approved usage.” Wis. Stat. § 990.01(1). The Recall Committee does not assert that it can manifest “his or her” intent, nor could it. By statutory definition, the Recall Committee cannot be a single individual. Wis. Stat. § 11.01(4).

sentence within § 9.10. Rather, the word “petitioner” must be given the same meaning throughout the recall petition statute. *Donaldson v. Bd. of Comm’rs of Rock-Koshkonong Lake Dist.*, 2003 WI App 26, ¶ 13, 260 Wis. 2d 238, 659 N.W.2d 66 (“words appearing multiple times in the same statute are given the same meaning unless the context clearly requires a different meaning”) (*reversed on other grounds*). Therefore, references in § 9.10 to “the petitioner” refer to an individual and not a corporate or other unnatural entity. The Government Accountability Board’s recall manual expresses this same conclusion and states that only an individual can be the recall petitioner. Under the heading “Who Can Initiate a Recall?” it states: “Any qualified elector of the election district from which the officeholder was elected may initiate a recall. . . . The person who files the recall petition is referred to as the petitioner.” Recall of Congressional, County and State Officials (June 2009) at 3.

Nowhere in the recall statutes is a committee or any other unnatural person permitted to be the recall petitioner.<sup>4</sup> Rather, committees can be formed for the purpose of supporting or opposing recall efforts. *See, e.g.*, Wis. Stat. § 11.02(3m) (identifying the appropriate “‘filing officer’ for . . . [a] committee which supports or opposes an effort to circulate and file a petition to recall an individual who holds an office”); Wis. Stat. § 11.20(4m) (requiring that a “committee which supports or opposes an effort to circulate and file a petition to recall an officer shall file a report . . . no later than 30 days after registration of the petitioner for recall of the officer”). Indeed, the Recall Committee registered as just such a committee.<sup>5</sup>

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<sup>4</sup> Note that because the recall petitioner must be a single individual, there is no danger of the petitioner completing the registration process multiple times in an effort to create a rolling circulation period that exceeds sixty days. Neither is there any danger of confusion regarding when a petition is “offered for filing,” since it is “the petitioner” that must present the petition to the filing officer. The clear language of § 9.10(2)(d) adequately addresses these issues.

<sup>5</sup> The Committee to Recall Kapanke’s GAB-1 Campaign Registration Statement, dated February 28, 2011, specifies that it is a recall committee registering for the purpose of supporting the effort to recall Senator Kapanke.

There is no doubt that under the clear, unambiguous language of Wis. Stat. § 9.10(2)(d), Mr. Scheller is the petitioner.

**II. Mr. Scheller Failed To Comply With The Statutory Requirements Set Forth In Wis. Stat. § 9.10(2)(d).**

**A. Mr. Scheller Was Required To File A Campaign Registration Form.**

Section 9.10(2) sets forth various requirements that must be met in order for the qualified electors of the 32<sup>nd</sup> Senate District to exercise their right to recall Senator Kapanke. For example, a recall petition may not be offered for filing during the first year of an elective term. Wis. Stat. § 9.10(2)(s). An otherwise valid signature on a recall petition may not be counted if the petition page it is on is not validly certified by a qualified circulator. Wis. Stat. § 9.10(2)(em). A qualified elector's signature on a recall petition may not be counted if his or her residency cannot be determined by the address provided on the petition. Wis. Stat. § 9.10(2)(e)4. And, a qualified elector's signature on a recall petition may not be counted if the elector signed the petition either too soon or too late, which is determined by the date the petitioner completes the required registration. Wis. Stat. § 9.10(2)(d), (e)2.

The petitioner's act of properly registering according to the requirements of § 9.10 is critical to the sufficiency of a recall petition, because the petitioner may not circulate a petition "prior to completing registration." Wis. Stat. § 9.10(2)(d). Section 9.10(2)(d) states:

***No petition may be offered for filing for the recall of an officer unless the petitioner first files a registration statement under s. 11.05 (1) or (2) with the filing officer with whom the petition is filed. The petitioner shall append to the registration a statement indicating his or her intent to circulate a recall petition, the name of the officer for whom recall is sought and, in the case of a petition for the recall of a city, village, town, town sanitary district, or school district officer, a statement of a reason for the recall which is related to the official responsibilities of the official for whom removal is sought. No petitioner may circulate a petition for the recall of an officer prior to completing registration.*** The last date that a petition for the recall of an officer may be offered for filing is 5 p.m. on the 60th day commencing after registration. After the recall petition has been offered for filing, no name may be added or removed. No signature may be counted unless the date of the signature is within the period provided in this paragraph.

(Emphasis added.) This provision imposes a distinct registration requirement on an individual who seeks to begin circulating a petition to recall a state senator. To satisfy this requirement, the petitioner must register under either Wis. Stat. § 11.05(1) or Wis. Stat. § 11.05(2).

**B. Mr. Scheller Has Never Registered With The Government Accountability Board.**

As the petitioner, Mr. Scheller had two registration options. He could have registered a committee, pursuant to Wis. Stat. § 11.05(1), or he could have registered as an individual, pursuant to Wis. Stat. § 11.05(2). It is undisputed that he never registered under either section. Mr. Scheller did not register as an individual under sub (2). Furthermore, the Recall Committee concedes that Mr. Scheller did not register – rather the Recall Committee itself registered. (See Recall Committee’s Rebuttal at 1 (“the Committee to Recall Kapanke filed its Campaign Registration Statement”) and at 3 (“the Committee filed its GAB-1 Campaign Finance Registration to which it appended a Statement of Interest”)). As the petitioner, Mr. Scheller has simply failed to fulfill the requirement that “the petitioner first file[] a registration statement.” Wis. Stat. § 9.10(2)(d).

Rather than confront the actual language of the statute, the Recall Committee opines that the “statutes anticipate . . . what occurred here,” including that Mr. Scheller “serves as the required elector.” (Recall Committee’s Rebuttal at 4.) As noted above, however, the recall statute does not provide that an individual merely serve as “the required elector” on behalf of some separate committee. Rather, the statute requires an individual “petitioner,” who must register, file a statement of intent to circulate a recall petition, circulate the petition and then timely offer the recall petition for filing. The Recall Committee’s argument is exactly the opposite of what the statute requires.

**C. Mr. Scheller Did Not Satisfy His Obligation To Register By Filing The Recall Committee's Registration Statement.**

Even if the Recall Committee had argued in the alternative that Mr. Scheller satisfied the requirements of § 9.10(2)(d) by filing a registration on behalf of the Recall Committee, such an argument would fail because Mr. Scheller is not a member of the Recall Committee. No reasonable construction of § 9.10(2)(d) would countenance the petitioner satisfying his or her registration obligation by filing a GAB-1 form for a separate entity.<sup>6</sup>

If a recall petitioner chooses to satisfy the registration requirement by registering as a committee pursuant to Wis. Stat. § 11.05(1), as opposed to registering as an individual under sub. (2), then “he or she” must satisfy the requirements of the definition of a committee. A simple reading of the relevant statutory provisions, which counsel for the Recall Committee has apparently not done, provides clear guidance. A committee can be either “any person other than an individual” (which a petitioner may not be) or “any combination of 2 or more persons.” Wis. Stat. § 11.01(4). Had Mr. Scheller registered as a committee, he would have to be one of the “2 or more persons” forming the committee. Yet, the Recall Committee concedes that Mr. Scheller is not one of the “2 or more persons” that comprise the Recall Committee, when it acknowledges that Mr. Scheller is merely the Recall Committee’s “agent.”<sup>7</sup> (Recall Committee’s Rebuttal at 2.)

As with registration under Wis. Stat. § 11.05 generally, a principal purpose of registering under § 9.10(2)(d) is to inform the Government Accountability Board whether the petitioner

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<sup>6</sup> This conclusion is confirmed by Wis. Stat. § 11.05(1), which provides that a committee’s registration statement “shall be filed by the treasurer,” and § 11.05(5m), which provides that the individual filing a registration statement must certify “that all information contained in a statement is true, correct and complete.”

<sup>7</sup> The Recall Committee has not provided any evidence of Mr. Scheller’s purported status as its agent, other than its counsel’s mere assertion. Mr. Scheller is not identified anywhere on the Recall Committee’s registration statement, despite the fact that the law requires the Recall Committee to specifically identify all of its principal officers in addition to its treasurer. Wis. Stat. § 11.05(3)(f).

intends to accept contributions and make disbursements in an amount sufficient to require the filing of finance reports or if the petitioner is exempt pursuant to Wis. Stat. § 11.05(2r). While the Recall Committee registered, the Government Accountability Board has no way of knowing whether or not the petitioner, Mr. Scheller, will “accept contributions, make disbursements or incur obligations in an aggregate amount of more than \$1,000 in a calendar year or accept any contribution or cumulative contributions of more than \$100 from a single source during the calendar year...” (GAB-1 form.) Accordingly, as expressly required in Wis. Stat. § 9.10(2)(d), the petitioner must register.

### **III. The Statutory Requirements Must Be Followed In Order To Compel A Recall Election.**

The Recall Committee claims that because the right of recall is constitutionally provided, certain errors must be excused. This argument cannot stand because there would be no logical stopping point for determining which essential requirements must be followed and which nonessential requirements can be ignored. The statutory requirements outlined in § 9.10 place numerous limitations on the electors’ right of recall; yet, the general right does not excuse failure to follow those prescribed requirements.

Here, the recall petitioner, Mr. Scheller, did not first file a registration statement. If this error can be excused, as the Recall Committee asserts, then perhaps the failure to file a statement of intent should also constitute excusable error. Perhaps a petition that is offered for filing on the 65<sup>th</sup> day after registration should be accepted, despite the clear procedural deficiency. After all, according to the Recall Committee’s reasoning, the will of the people would otherwise be thwarted by the petitioner’s delay in assembling the petition and delivering it to the Government Accountability Board’s office in Madison.



contrary to the clear meaning of the statute”) (citation omitted); *Mallo v. Wisconsin Dept. of Revenue*, 202 WI 70, ¶ 16, 253 Wis. 2d 391, 645 N.W.2d 85 (holding that a reviewing court’s first duty is to the legislature and, as such, a court will not “uphold a rule that is contrary to the language of the statute”).

Further, it is clear that “[a]n agency cannot promulgate a rule inconsistent with an unambiguous statute.” *Oneida County*, 180 Wis. 2d at 125; *Mallo*, 2002 WI 70, ¶ 15 (holding that “[n]o agency may promulgate a rule which conflicts with state law”) (citations omitted). In fact, the Wisconsin Supreme Court has held that “a rule out of harmony with the statute is a mere nullity.” *Plain*, 268 Wis. at 511 (citations omitted). As such, it is abundantly clear that “[a]n administrative rule, even of long duration, may not stand at variance with an unambiguous statute.” *Basic Products Corp.*, 19 Wis. 2d at 186.

It follows that an agency’s method of practice or interpretation that ignores the plain language of a statute cannot stand. In *State ex rel. Stearns v. Zimmerman*, the plaintiff failed to file his nomination papers for the senate primary election within the timeframe mandated by statute. *State ex re. Stearns v. Zimmerman*, 257 Wis. 443, 445, 43 N.W.2d 681 (1950). In denying the plaintiff’s prayer for relief, the Wisconsin Supreme Court held that “the time limit set by the legislature for the filing of nomination papers must be strictly enforced.” *Id.* This is so because the legislature has expressly provided a firm deadline for the filing of nomination papers, and any interpretation in conflict with that firm deadline cannot stand. *Id.* at 446. According to the court, to hold otherwise would be tantamount to allowing an agency to amend the statute, not construe it. *Id.* Ultimately, “[t]he interests of the electors are served by a strict compliance” with the language of a statute where that language evinces a clear legislative intent. *State ex rel. McIntyre v. Bd. of Election Commissioners of the City of Milwaukee*, 273 Wis. 395,

402, 78 N.W.2d 752 (1956) (holding that the principles articulated in *Sterans* apply to deadlines for seeking a recount where the legislature has explicitly provided filing deadlines).

Here, to allow a petition for recall which has not been offered for filing in compliance with the plain language of Wis. Stat. § 9.10(2)(d) to go forward would be tantamount to amending, rather than interpreting, the statute. See *State ex rel. Stearns*, 257 Wis. at 446. Like the statutes at issue in *Stearns* and *McIntyre*, Wis. Stat. § 9.10(2)(d) is “so specific and so within the realm of the legislative that there is no occasion to resort to construction or interpretation.” *State ex rel. McIntyre*, 273 Wis. at 402. Wis. Stat. § 9.10(2)(d) specifically states that “[n]o petitioner may circulate a petition for the recall of an officer prior to completing registration.” The legislative intent in this section is clear – a petitioner *must* register under Wis. Stat. § 11.05. Here, the petitioner, Mr. Scheller did not register. Rather, the Recall Committee – a separate entity of which Mr. Scheller is not a member – registered with the Government Accountability Board.

### CONCLUSION

The Recall Petition is invalid because the petitioner Patrick Scheller failed to follow the mandatory requirements of Wis. Stat. § 9.10(2)(d) in order to trigger the start of the circulation period. No signature on the Recall Petition may be counted and the entire petition is, therefore, insufficient.

Dated this 21<sup>st</sup> day of April, 2011.

MICHAEL BEST & FRIEDRICH LLP  
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By: 

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**McLeod, Eric M (22257)**

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**From:** Falk, Shane - GAB [Shane.Falk@wisconsin.gov]  
**Sent:** Friday, April 08, 2011 2:49 PM  
**To:** McLeod, Eric M (22257)  
**Cc:** Kennedy, Kevin - GAB; Robinson, Nathaniel E - GAB; Buerger, David - GAB; Haas, Michael R - GAB; Beilin, Lewis W - DOJ; Blythe, Christopher J - DOJ  
**Subject:** Re: Confirmation 10 Day

Attorney McCleod:

This email confirms our telephone conversation early in the afternoon on Thursday, April 7, 2011.

Upon advice of our counsel, the Kapanke Recall challenges are due Monday at 4:30 p.m. rather than any previous date we communicated to you, as the civil procedure timing of Sec. 801.15, Wis. Stats., does not apply to recall matters under Sec. 9.10, Wis. Stats. The Sec. 990.001(4), Wis. Stats., provisions still apply, but that does not extend your deadline beyond Monday.

It is my understanding that you are currently working with our counsel to obtain relief from a Court regarding the statutory 10 day challenge deadline.

Thank you.

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